Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

77-366

BLINDER ROBINSON & COMPANY, INC.,

Petitioner,

vs.

HALPERT OBERST & COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Blinder, Robinson and Company petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court (Docket #76-2387).

The judgment affirmed the District Court's decision finding a binding contract between the petitioner and respondent after a trial without jury (Civil Action 75-363 L.A.W.).

OPINIONS BELOW

The opinion of the Court of Appeals is set forth as Appendix A.

The opinion of the District Court is set forth as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is authorized by 28 U.S.C. §1254(1).

ISSUES INVOLVED

1. Did the Court of Appeals err, when it failed to find that an agreement on file with the National Association of Securities Dealers was notice to a third party of the agency relationship between the parties?

2. Did the Court of Appeals err, when it permitted the introduction of parol evidence of prior or contemporaneous conversations to substitute a new and different contract for the one evidenced by a writing?

3. Did the Court of Appeals err when it found that the respondent had proved by a fair preponderance of evidence that it had entered into an agreement with the petitioner?

PRELIMINARY STATEMENT

The United States District Court based on the testimony of an employee of the respondent, contrary to an agreement on file with the National Association of Securities Dealers and contrary to the written confirmation of the respondent found the petitioner was a principal in the purchase of municipal bonds and liable for payment of said bonds to the respondent. The

Court of Appeals without permitting oral arguments affirmed the District Court's decision setting forth as the basis for its decision the reasons enumerated in the District Court's opinion.

The respondent's entire case was based on the testimony of one of its employees who testified that based on a conversation with an employee of the petitioner he believed the petitioner to be the principal. These facts were contrary to a written confirmation prepared by the respondent and to the fact that the respondent delivered the bonds and received payment from a third party. The payment received from the third party was returned unpaid and the respondent filed a claim against it in a subsequent insolvency proceedings.

The District Court in its opinion made the following conclusions of law:

> "Where a third party has no notice that an agent is acting for another, the principal is said to be undisclosed Restatement of Agency 2d, §§4, 322 (1958). An agent who executes a contract for an undisclosed principal becomes liable as a party to the contract. *Volkenburg, K-G v. the S.S. Henry Denny,* 295 F.2d 330 (7th Cir. 1961); 3 AM Jur 2d, *Agency,* §317 (1962).

In this regard it should be noted that the agent always has the duty of disclosure:

> . . . (T)he law does not impose a duty of an inquiry upon a person dealing with an agent of an undisclosed or partially disclosed principal.

Orient Mid-East Liner v. Albert E. Bowen, Inc., 458 F.2d 572, 577 (2d Cir. 1972); *2 Williston on Contracts,* §288 (3rd ed. 1959).

> Thus, in a contract action the plaintiff has the initial burden of showing that the defendant was a party to it. If, at the time of contracting, the defendant did not unambiguously indicate that it was acting in a representative capacity only, the burden of going forward with such evidence shifts to the defendant. *Restatement of Agency 2d,* §320, comment b (1958)."

The written evidence clearly and unambiguously showed that an agreement was on file with the National Association of Securities Dealers which set forth the relationship between the petitioner and its principal. These agreements are common in the industry and have been form of notice to those in the securities industry. Both the petitioner and the respondent are a part of that industry and aware of its workings.

The respondent invoiced, delivered and accepted payment from a third party. These acts are totally inconsistent with the findings that the petitioner was a undisclosed principal.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in affirming the District Court's decision in effect negated the authority of the National Association of Securities Dealers to file clearing agreements as notice to the securities industry. These agreements have been filed for many years and has heretofore served as notice to all parties. The Court should resolve the matter as to whether such agreements will have any validity in the future especially in light of the fact that there are numerous such agreements on file today. The industry should be given an opportunity to properly advise its members as to existing law.

I further submit that this Court should grant the writ of certiorari to resolve the questions of whether parol evidence can be introduced to substitute a new, a different contract for the one

evidence by the writing. The courts have repeatedly held that a written instrument cannot be changed, explained or set aside by parol evidence. (*Western Machinery v. Northwestern Import Co.,* 254 F.2d 453; *Bellows v. Porter,* 104 F. Supp. 648; *Brown v. Financial Services Corp.,* 489 F.2d 144.)

In order for extrinsic evidence to be admitted there must be a showing of sham or mistake. *Kilpatric Bros. v. IBM Corp.,* 464 F.2d 1080. The respondent made no such allegations in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Irwin S. Lampert
Attorney for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2387

HALPERT OBERST & CO., a New Jersey Corporation,

v.

BLINDER, ROBINSON & COMPANY, a New York Corporation,

Appellant

Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 76-363)

Submitted Under Third Circuit Rule 12(6)
June 9, 1977
Before: ALDISERT, ROSENN, HUNTER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by The Honorable Lawrence A. Whipple, No. 75-363 (D.N.J., filed July 28, 1976), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: June 9, 1977

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1977.

Test: Thomas F. Quinn
Clerk, United States Court of Appeals
for the Third Circuit

Costs taxed in favor of appellee as follows:

Brief — $294.00

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT

NOT FOR PUBLICATION A76

UNITED STATES DISTRICT COURT
District of New Jersey
Newark, N.J. 07101

Chambers of
LAWRENCE A. WHIPPLE
Chief Judge

O P I N I O N

July 28, 1976

James E. Masterson, Esq.
Kleinberg, Moroney, Masterson & Schachter
225 Millburn Avenue
Millburn, New Jersey 0-041

Seymour Rudenstein, Esq.
Mellinger & Rudenstein
301 Main Street
Orange, New Jersey 07050

Re: Halpert Oberst & Co. v. Blinder,
Robinson & Company
Civil Action No. 75-363

Gentlemen:

This case was tried before the Court, sitting without a jury on July 19, 1976. At the close of defendant's case, the Court ordered all counsel to submit proposed findings of fact and conclusions of law. Decision was reserved.

The Court has had an opportunity to review the pleadings, legal memoranda, trial testimony and evidence introduced at trial. I am now prepared to decide the case.

Plaintiff, Halpert, Oberst & Co. (hereinafter "Halpert") is a New Jersey Corporation engaged in the business of selling and buying securities. Defendant, Blinder, Robinson & Company (hereinafter "Blinder") is a New York securities firm also known in the business as a dealer-trader.

This case involves the sale of 15 New York City municipal bonds. It is uncontroverted that Halpert sold these bonds to Blinder on January 15, 1975 and that Halpert has never been paid the purchase price of $15,531.68. Blinder contends that it was not acting on its own behalf when it offered to buy the bonds from Halpert. Rather, Blinder claims it was a mere agent of a firm known as Executive Securities Co. It contends further that this agency relationship was disclosed to Halpert. Blinder seeks to avoid liability on the ground that an agent cannot be held accountable for contracts executed in the name of and on behalf of a disclosed principal. Halpert, on the other hand, insists that at all times relevant to this transaction, it considered Blinder to be the purchaser and that it understood Executive to be merely Blinder's clearing agent which handled "paper work".

The crucial issue of fact to be decided by this court is whether an agency relationship which may have existed between Blinder and Executive was actually disclosed to Halpert.

I have concluded that plaintiff has proven by a fair preponderance of the evidence that defendant Blinder was the purchaser of the bonds, that plaintiff had no notice of an agency agreement between Blinder and Executive, and that even if such an agreement existed, Blinder failed to disclose this relationship to plaintiff.

FINDINGS OF FACT

On January 15, 1975, Larry Kaplan, an employee of Blinder called Stephen Golden, a bondsalesman for Halpert. Kaplan knew that Halpert was offering New York City municipal bonds that day and he telephoned to invite an offering. Golden made an offer to sell 15 bonds at $1,000 each, totaling $15,531.68. Kaplan accepted and told Golden to have them delivered to the Bank of North America for payment. At no time during this conversation did Kaplan indicate that he was acting for anyone other than his employer.

The bonds were subsequently delivered according to instructions but the bank refused to pay. Halpert eventually received new instructions to deliver the bonds to Executive Securities in Jersey City, New Jersey. Golden then caused a confirmation slip to be prepared (C-1/evid.) upon which the contra party was listed as "Executive Securities, A/C Blinder, Robinson & Co."

Golden believed that Executive was the clearing agent for Blinder. The contra party notation was intended to facilitate delivery and payment.[1]

---

1. On December 8, 1974 Golden sold New York City bonds to Halpert. Then, as in the instant case, delivery was made to the Bank of North America and delivery was refused. Golden was then instructed to re-deliver the bonds to the bank with the notation "Executive Securities, A/C Blinder, Robinson & Co." Based upon this prior transaction Golden reasonably believed that Executive was the clearing agent for Blinder.

Executive issued a check in payment of the bonds but since it lacked a second authorized signature it was not honored by the payor bank. Before a void check could be obtained, Executive became legally insolvent. Halpert has not been paid.

(Cont'd)

CONCLUSIONS OF LAW

Where a third party has no notice that an agent is acting for another, the principal is said to be undisclosed Restatement of Agency 2d, §§ 4, 322, (1958). An agent who executes a contract for an undisclosed principal becomes liable as a party to the contract. *Volkenburg, K-G v. the S.S. Henry Denny,* 295 F. 2d 330 (7th Cir. 1961); 3 AM Jur 2d, *Agency,* § 317 (1962).

In this regard it should be noted that the agent always has the duty of disclosure:

> . . . (T)he law does not impose a duty of an inquiry upon a person dealing with an agent of an undisclosed or partially disclosed principal.

Orient Mid-East Liner v. Albert E. Bowen, Inc., 458 F.2d 572, 577 (2d Cir. 1972); *2 Williston on Contract,* § 288 (3rd ed. 1959).

Thus, in a contract action the plaintiff has the initial burden of showing that the defendant was a party to it. If, at the time of contracting, the defendant did not unambiguously indicate that it was acting in a representative capacity only, the burden of going forward with such evidence shifts to the defendant. *Restatement of Agency 2d,* § 320, comment b (1958).

(Cont'd)

Even assuming arguendo that a binding agreement existed between Executive and Blinder whereby Blinder became the agent of Executive and its introduced customers, this arrangement was never made known to plaintiff.

Mr. Kaplan was not called as a witness. In fact defendant failed to call any witness who had first hand knowledge of the circumstances of the subject transaction. Golden's testimony regarding the telephone conversation stands uncontradicted. I find his testimony to be credible in all respects.

Appendix B — Opinion of the United States District Court

Applying the foregoing principles of law to the facts of this case, I find that plaintiff has established the existence of a contract for the sale of municipal bonds. Defendant has not met its burden of going forward with evidence which would rebut the presumption that Blinder was the purchaser.

Judgment shall be entered in favor of plaintiff. Plaintiff shall submit an appropriate order forthwith.

Very truly yours,

Lawrence A. Whipple
Chief Judge, U.S.D.C.

Original filed with Clerk of the Court

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vs.

HALPERT OBERST & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Issue Involved

The single issue presented herein is whether petitioner has advanced any ground to justify the issuance of a writ of certiorari in this proceeding.

Reasons for Denying the Writ

1. A reading of the petition filed in this proceeding discloses that none of the reasons advanced by petitioner as the basis for the granting of the writ are contained in Rule 19 of the Rules of the Court relating to considerations governing review on certiorari.

2. The issue now raised by petitioner that the determinations of the lower Courts negated the authority of the National Association of Securities Dealers to file clearing agreements as notice to the securities industry was never presented to those Courts. The trial record discloses no evidence that such agreement was ever filed with any person or group.

3. The case as presented to the District Court below involved fact questions, the principal one being related to the credibility of plaintiff's only witness. In addition, the trial involved the proper application of certain principles found in the law of Agency.

It is submitted that none of the determinations reached by the trial judge and affirmed on appeal furnish grounds upon which to base the issuance of the writ sought by the petitioner.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

JAMES E. MASTERSON,
Attorney for Respondent.

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REPLY BRIEF FOR PETITIONER

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In The

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-against-

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

Respondent, Halpert, Oberst & Company, alleges that the issues now raised by the petitioner are totally without merit. The trial record clearly discloses that the agreement was put into evidence and filed with the National Association of Security Dealers.

The appendix, attached hereto, are excerpts from the trial record which supports petitioner's contention. In his testimony, Meyer Blinder stated:

"We, as a firm, are registered with Executive Securities. We are registered with the NASD and the SEC with Executive Securities as their sales agent."

CONCLUSION

For the foregoing reasons, it is clear that the reasons for granting the writ, as set forth in the petition, are further supported herein and that the petition for the writ of certiorari should be granted.

Respectfully submitted,

s/ Irwin S. Lampert
Attorney for Petitioner

APPENDIX

EXCERPTS FROM THE TRIAL RECORD

* * *

Blinder-Direct [A37, 31]

A Six years.

Q Now, do you know who Executive Securities Corporation is?

A Yes.

Q Did you have a deal with Executive Securities Corporation?

A Yes.

Q Was that an oral deal or a written deal?

A Written deal.

Q I show you this document and ask you whether or not this is the written contract that you have with Executive Securities?

A Yes.

Q Who's that signed by?

A Myself as president and Richard Battoli, the president —

THE COURT: Richard who?

THE WITNESS: Richard Battoli of Executive Securities.

THE COURT: Let it be marked for identification.

MR. RUDENSTEIN: I'm going to offer it in evidence, your Honor.

MR. MASTERSON: Let me see it.

Where's the original of this document, sir?

• • •

Blinder-Cross

[A56, 50] registered broker dealer, so we're salesmen, and they have no salesmen. They are a wholesale house. They make markets and everything else. All we have is salesmen. The salesman gets a commission working for Executive Securities.

Q But all they get out of this transaction, where they're supposed to be the principal and they're supposed to pay for the bonds and they're supposed to take risks, all they're getting is $8 on each side of the transaction?

A They take no risk. The customer is buying it. He pays for the securities in a seven-day period. They pay for it in something like a 15-day period. There is no risk.

Q Well, all they're —

A And all clearing arrangements, Merril Lynch as clearers for Bache and Company would only pay them a fee for brokerage of some $3 or $4 for the transaction.

Q Isn't Executive Securities merely doing a payment for this transaction?

A No. They assume —

Q Doing the bookkeeping?

A Not even the bookkeeping. The regulation states if a broker dealer was in business for himself, he has to have a minimum $50,000 in capital. As clearing agent, all you have to have is $5,000 in capital. Therefore, if we were a business, we could not handle any customer accounts. We [A57, 51] could not handle their money. That's the reason you use a clearing agent. So you clear through another broker for that reason, if his capital is better than yours.

Q Now, this sale was made ultimately to the owner of the stock by a man named Silverman?

A That's correct.

Q And he was —

THE COURT: Bonds, you mean.

MR. MASTERSON: Excuse me.

THE COURT: Bonds. You said stock.

Q By Silverman, right?

A That's correct.

Q He was on your payroll?

A No. That's not. He works on a commission. He's registered as an RR with us.

Q With you?

A That's correct.

Q Not with Executive Securities?

A That's correct. We, as a firm, are registered with Executive Securities. We are registered with the ASD and the SEC with Executive Securities as their sales agent.

THE COURT: Would you know whether Executive did clearing for other brokers besides — for other firms besides —

THE WITNESS: Yes, your Honor.

[A58, 52] THE COURT: — Blinder?

THE WITNESS: Yes, your Honor.

THE COURT: They did?

THE WITNESS: They cleared for 15 firms.

THE COURT: Members of the stock exchange or not?

THE WITNESS: No.

THE COURT: But members of the clearing house?

THE WITNESS: No. Members of the OTC. You're talking about who they cleared for?

THE COURT: Right.

THE WITNESS: They were brokers, small brokers like myself.

THE COURT: Were they members of the Board?

THE WITNESS: No. They were members of the Boston Stock Exchange.

THE COURT: Members of the clearing house?

THE WITNESS: No. Members of the NESD, and so are we.

THE COURT: Registered, right?

THE WITNESS: Yes. We were registered, and that's why they could take our account and —

THE COURT: Let me ask you this: Registered with ASD as what?

THE WITNESS: As broker dealers.

* * *